In the Supreme Court of the United States.

OCTOBER TERM, 1922.

CORONA COAL COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 380.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Court of Claims dismissing the petition of the plaintiff upon the ground that that court had no jurisdiction of the case. The petition is very long, but its allegations may fairly be summarized in the language of the Court of Claims as follows (p. 22):

> The petition alleges in substance that the plaintiff's chief business is the mining and sale of coal; that it had entered into contract with certain railroads to supply them with coal for a certain period; that subsequent to the date of these contracts the railroads were taken over by the Government; that the Railroad Administration insisted that it was entitled to have the coal provided for in these contracts delivered at the same price which the plaintiff

had agreed upon with the railroads; that the plaintiff refused to deliver the coal at that price; and that therefore the United States Fuel Administration requisitioned 171,476.61 tons of coal, which under said requisition were delivered to the United States Railroad Administration, and that the plaintiff was paid the price by the Government which had been agreed upon by it and the railroads before they were taken over, the sum paid to the plaintiff being $385,593.76, while the price fixed by the Fuel Administration for said coal was $486,997.79, and the plaintiff sues for the difference in price, which is stated in the petition as the sum of $107,431.99.

The action, therefore, is to recover from the United States because the Fuel Administration compelled the plaintiff to live up to the contracts which it had made with railroad companies prior to the taking over of the railroads by the President. The contracts which it had made with the railroads are attached to the petition as Exhibits A, B, and C (pp. 8–13). Exhibits A and B are practically identical in their terms, and each contains a provision that all terms and conditions, rights and obligations, "shall inure in favor of and be binding upon the heirs, executors, administrators, legal representatives, successors, assigns, and lessees of both parties hereto." Paragraph 7 of each contract, pages 9 and 11. Each of these contracts also contains the provision that if the coal company, for any reason other than those specified, should fail to ship coal as provided in the

contract, the railway company "shall have the right to go into the open market and buy the coal, charging the coal company for all cost over and above the delivered cost to the Railway Company, of coal furnished under this contract." Paragraph 6, pages 9 and 11. Under none of the contracts is the railway company required to do anything except to take and pay for the coal and furnish the cars to transport it. After the controversy arose, and on November 18, 1918, the United States Fuel Administration wrote a letter to the plaintiff (Exhibit D, p. 14) containing the following:

> In complying with the requisition orders of the United States Fuel Administration for the shipment of coal to the various companies mentioned in that letter, we desire to say that the same is entirely without prejudice to your right to assert a claim against the Railroad Administration or these various railroad companies for any amount to which you may claim you are legally entitled to receive from these companies or the Railroad Administration for the coal so requisitioned, and this regardless of any method of billing by you or of any settlements that may be made by the different railroads or the United States Fuel Administration for such coal. This direction is also without prejudice to the right of the United States Railroad Administration or any of these railroads to assert against any claim you may make their rights growing out of any contracts which they allege exist between you and these various companies, regardless of

> the methods of billing by you and the settlement by them for the coal so requisitioned by this Administration.

The coal having been bought and paid for at the contract price, the only point which the plaintiff can be said to have "saved" was its right to assert a claim against the Railroad Administration or the railroad companies for the amount which it might claim to be legally entitled to receive from those companies or the Railroad Administration for the coal so furnished.

The United States has filed a motion to dismiss the appeal upon the ground that it has been taken contrary to the provisions of Section 154 of the Judicial Code because, after the decision of the Court of Claims, and prior to taking the appeal, the plaintiff begun three actions in the District Court of the United States for the Eastern District of Louisiana against James C. Davis, as Agent for the President under the Transportation Act of 1920, which actions are based upon the same causes of action as are set forth in the petition herein.

ARGUMENT.

I.

The appeal should be dismissed.

Section 154 of the Judicial Code provides as follows:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any

> other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately under the authority of the United States.

It appears from the record that the judgment of the Court of Claims dismissing the plaintiff's petition was rendered on the 13th day of February, 1922 (p. 22), and that the appeal therefrom was allowed on April 10, 1922 (p. 23). It appears from the motion to dismiss that on or about the 27th day of February, 1922, the plaintiff began actions in the District Court in Louisiana against James C. Davis, as agent of the President under the Transportation Act of 1920, to enforce the same causes of action. Section 206 (a) of the Transportation Act of 1920 (41 Stat. 461) provides:

> Actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods

> of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which, but for Federal control, would have had jurisdiction of the cause of action had it arisen against such carrier.

It would seem to be apparent, therefore, that this appeal, being in violation of Section 154 of the Judicial Code, should be dismissed.

II.

Plaintiff's alleged cause of action should be brought under section 206 (a) of the transportation act against the agent of the President and not in the Court of Claims against the United States.

When the President took over control of the railroads, he found that the plaintiff had made contracts with certain of these railroads for furnishing them coal at a fixed price per ton. Under Section 25 of the Lever Act of August 10, 1917 (40 Stat. 276, 284), the President was authorized and empowered to fix the price of coal, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, and storage thereof among dealers and consumers, and it was further provided that "the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission." It will be observed that the

prices so fixed are maximum prices. There is no reference to minimum prices, nor is there any indication of an attempt upon the part of the United States to establish a minimum price below which coal should not be sold, nor to compel sale at the maximum price or guarantee the payment of the maximum price. The Corona Coal Company attempted to repudiate its contracts with the railroad company which were in existence at the time federal control began and to obtain for itself prices in excess of those under which it was obligated to furnish the coal, the price fixed by the President under the Lever Act being greater than that fixed by its contracts. The Railroad Administration refused to submit to this, and the Fuel Administration, having the power to require distribution and apportionment of all coal produced, required it to furnish the coal to the railroads, and the Railroad Administration refused to pay more than the contract price. If the railroad companies had been operating their roads and the Fuel Administration had compelled the Corona Coal Company to furnish coal to them, the question of the amount which they should have paid for their coal would have been determined in a suit by the Corona Coal Company against the railroads—that is, its cause of action "would have been of such character as prior to federal control could have been brought against such carrier." The cause of action is, therefore, one to be brought against the Agent of the President, for it arose out of the possession,

use, or operation by the President of the railroads. This would seem to be clear. Furthermore, Congress has made special provision for paying judgments in such actions, for by subdivision (e) of Section 206 of the Transportation Act it has provided (41 Stat. 462):

> Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210.

This was clearly understood at the time the controversy arose. Plaintiff did not attempt to save or keep alive or reserve any cause of action against the United States. The only thing reserved was a claim against the Railroad Administration or the railroads. Exhibit B, page 14.

The proclamation of the President dated December 26, 1917, taking over the railroad systems, contained, among other things, this language:

> Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies. * * *
>
> Except with the prior written assent of said director, no attachment by mesne process or

> on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine.

Under the Federal Control Act of March 21, 1918 (40 Stat. 451, Section 12), it is provided that money derived from the operation of the carriers during federal control, unless otherwise directed by the President, should not be covered into the Treasury but should remain in the custody of the same officers, and the accounting thereof should be in the same manner and form as before federal control. Disbursements therefrom should be made in the same manner as before federal control, and for such purposes as under the Interstate Commerce Commission classification of accounts were chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with federal control as the President might direct. By Section 10 of that Act it was provided that carriers, while under federal control, should be subject to all laws and liabilities as common carriers except in so far as should be inconsistent with any act applicable to federal control or within the order of the President. Actions at law or suits in equity might be brought by and against such carriers and judgments rendered, and it should be no defense to an action that the carrier was an instrumentality or

agency of the Federal Government, but no process, mesne or final, should be levied against any such property under federal control. In construing this section in the case of *Dampskies Actieselskabit Sangstag* v. *Hustis* (D. C. Mass. 1919, 257 Fed. 862), the court said:

> The intention underlying section 10 of the Railroad Act of March 21, 1918 (40 Stat. 456, c. 25 (Comp. St. 1918, §3115-3/4j), is clear. It was that the railroads, although under federal control, should continue to be subject to all legal liabilities, enforceable in the ordinary way as if federal control did not exist, except that attachment on mesne process and levy on execution were forbidden.

III.

The petition alleges no cause of action against the United States.

The petition sets forth at great length facts which are in reality simple, as shown in the opinion of the Court of Claims. The gist of it is that the Fuel Administration compelled the plaintiff to furnish coal for the operation of the railroads, and the Railroad Administration refused to pay more than the contract price, which price was less than that fixed by the Fuel Administration as the price to be paid by those who did not have contracts made in good faith prior thereto. Obedience to the orders of the Fuel Administration, even at a price less than a claimant had previously contracted to sell to others, does not give rise to a cause of action against the

United States. *Morrisdale Coal Company* v. *United States*, 259 U. S. 188. It is even more obvious that no cause of action arises against the United States because the Fuel Administration compelled the plaintiff to furnish the coal without attempting to fix a price, other than the one at which the plaintiff had contracted to deliver it. The purpose of the Lever Act was not to increase the price of coal, but to keep it within reasonable bounds. It did not purport to interfere with existing contracts made in good faith, nor did it seek to protect those who, upon one pretext or another, saw fit to violate existing contracts for the purpose of securing higher prices. It is difficult to conceive of any good reason either in law or in morals why the plaintiff should be given a cause of action against the United States based upon its own refusal to carry out contracts made in good faith with these railroad companies. It is difficult to find any reason whatever for its refusal to carry out the contracts, except a hope that by so doing it could acquire a cause of action against the United States and thereby reap a profit from the needs of the country in time of war.

The plaintiff seeks to excuse its conduct by alleging various considerations which moved it to enter into the contracts for supplying coal to the railroad companies, which it claims did not continue after Government control. This is immaterial. The contracts themselves contained no stipulations by the railroads to do anything more than accept and pay for the coal at the contract price, and to furnish the

cars to deliver it. It is not alleged that these obligations were not performed. It offers as a legal explanation the specious reason that the contracts were not formally assigned to the President when he took control of the railroads and that it was not required to accept the President in place of the railroads. Two of the contracts expressly provided that the rights and obligations thereof should inure in favor of and be binding upon the heirs, executors, administrators, legal representatives, successors, assigns, and lessees of both parties. Without attempting to discuss the nice distinctions and limitations of which these words might be susceptible, it would indeed seem strange to hold that the President of the United States, in time of war and under the Acts by virtue of which he took over the operation of the railroads, was not in some sense the legal representative of the railroad companies.

It would seem that the possession and operation of the railroads by the President was somewhat analogous to the case of a receivership, and it is well settled that receivers of a corporation may adopt and enforce contracts made prior to the receivership. *United States Trust Company* v. *Wabash, etc., Railroad Company*, 150 U. S. 287; *Girard Life Insurance Company* v. *Cooper*, 162 U. S. 529; *Commonwealth* v. *Franklin Insurance Company*, 115 Mass. 278. And the rule which gives the receiver the right is not reciprocal—the other party must perform if the receiver so elects. Beach on *Receivers*, page 332.

There is another and, as we think, more logical view to take of the situation. When the President took over the railroads and the control thereof and through the officers acting under his authority required the plaintiff to fulfill the contracts which it had made with the railroads, he in effect took over the contracts themselves. The Joint Resolution of April 6, 1917, declaring the existence of a state of war empowered the President to employ the resources of the Government to carry on the war and pledged all the resources of the country to bring it to a successful termination. When, to assist in bringing about that result, he took over the railroads and railroad systems, can it be said that he did not take over and apply to the prosecution of the war not merely the tracks, cars, and stations but their contracts, resources, rights, and appurtenances of every kind, including the rights which they had to demand fulfillment by those who had made contracts to supply them with the facilities and means of operation? It seems to us absurd to say that in the exercise of this supreme national power the President had to obtain the consent of the Corona Coal Company to use, appropriate, and enjoy the benefits of these existing contracts. The power of the Government to take for public use contracts, as well as physical properties, is beyond question. See *Omnia Commercial Company* v. *United States*, April 9, 1923. This would seem to be a complete answer to any argument based upon the abstract principles of novation, subrogation, or assignment. The President chose to avail himself of these contracts

as part of the railroad property, and he was not required to ask the consent or approval of the Corona Coal Company or of anyone else.

There was no contract, express or implied, on behalf of the United States that the plaintiff should receive the *maximum* price fixed for coal by the Fuel Administration. There was no act of Congress requiring that price to be paid. There was no breach of any contract by the United States. The breach was by the plaintiff when it defied the President and refused to carry out its contracts with the railroads. The cause of action is not based on any act of any officer of the United States. It is based on the plaintiff's own act in using the necessities of the country in war time as a pretext for avoiding its contracts. No cause of action under Section 10 of the Lever Act was stated, based upon the requisitioning of property, the fixing of a price by the President and an election to take 75 per cent of that price and sue for the balance necessary to make just compensation.

It is not even alleged that the price paid under the contract was not fair and just compensation.

IV.

The appellant has sustained no damage.

Under no view of the case is it possible to see how the plaintiff has sustained any damage in the legal sense of the word. It has received all that it could possibly, in law, be held entitled. As we understand it, the plaintiff concedes that, if the railroads had not

been taken over by the President, it would have been under obligation to furnish the coal in accordance with its contract. Whether it concedes it or not, such would have been the fact. If it had refused to deliver under the terms of two of the contracts, the railroad companies were expressly authorized to buy in the open market and charge the plaintiff with the difference. Whether that provision had been in the contract or not, the railroads would have had the right, upon failure of the plaintiff to perform the contract, to buy in the market and the difference between the amount paid and the contract price would have been the measure of damages.

CONCLUSION.

The appeal should be dismissed or the judgment appealed from affirmed.

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APRIL, 1923.

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